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In The Supreme Court of the United States

UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, et al.,

Petitioners,

v.

UNITED AIR LINES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

I. Introduction

United's retired pilots' contractually vested pension benefits were unjustly bargained away by ALPA without the retired pilots' consent, for the sole benefit of ALPA and the active pilots, and the bankruptcy court has denied the retired pilots the recourse and protections to which they are entitled to under 11 U.S.C. § 1113. ALPA did what no other union participating in United's Chapter 11 proceedings was willing to do and what the union in *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir. 1986) refused to do. While the representatives of the flight attendants, mechanics, ramp workers, flight dispatchers and United's other unionized groups fought to protect the pension rights of their retired members, ALPA used the vested benefits of the retired pilots as bargaining chips in negotiations with United and struck a deal that never could have been made outside of bankruptcy. ALPA's leadership invaded the pension savings of its retired members so that ALPA and its active members could obtain $550 million in convertible notes, access to a new profit sharing plan, a new defined contribution plan and other lucrative benefits after the termination of the Pilot Plan, even though the retired pilots, who earned and owned the right to receive approximately two-thirds of Pilot Plan benefits, were given nothing under the agreement negotiated by ALPA and United.

Although it is not difficult to believe that United, who no longer needs the services of the retired pilots, was willing to enter into an agreement that was grossly unfair to the retired pilots, the bankruptcy court had no basis for approving Letter Agreement 05-01 or ruling that ALPA and United were "perfectly free" to bargain away the vested pension rights of United's retired pilots. The bankruptcy court should have given the retired pilots access to the protections to which they are entitled under 11 U.S.C. § 1113.

Now, United and ALPA both argue that, because too much time has passed, nothing can be done to help the retired pilots. Both argue that nothing unfair has transpired during United's reorganization proceedings and that United and

ALPA were justified in engaging in negotiations over contractually vested retirement benefits that did not belong to either of them. Although neither United nor ALPA took issue with the cases cited by URPBPA, which demonstrate that outside of bankruptcy, an employer has no right to tamper with the contractually vested benefit rights of its former employees, United and ALPA assume that what is dead wrong outside of a Chapter 11 reorganization may be permitted without restriction once an employer files for bankruptcy. This is not how bankruptcy law works. Furthermore, collective bargaining, inside or outside of the bankruptcy courts, is not a mechanism by which employers and unions enrich themselves by taking pension rights away from retirees.

This is a case the United States Supreme Court should decide. The three briefs presented by the parties demonstrate that this controversy raises important legal questions. This appeal involves a circuit split regarding the manner in which retirees' vested retirement benefits should be handled under § 1113 of the Bankruptcy Code. It raises issues related to how a widely followed holding from a United States Supreme Court case, *Allied Chemical & Alkali Workers Of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383 (1971), should be applied within the context of a Chapter 11 reorganization proceeding and it involves important issues regarding the construction of 11 U.S.C. § 1113 and the effect of the enactment of 11 U.S.C. § 1114. More broadly, this case raises issues regarding the balance that should be struck during Chapter 11 bankruptcy proceedings between the rights of active and retired employees and the financial needs of a reorganizing debtor, and it presents this Court with the opportunity to clarify the relationship between the Bankruptcy Code, labor law and the Employee Retirement Income Security Act ("ERISA").

In order to elucidate this controversy, URPBPA will outline three basic problems with the briefs filed by United and ALPA. First, both briefs misinterpret the Seventh Circuit's opinion and argue that, even if this Court granted URPBPA's petition, there is no relief that could be granted to the retired pilots. Second, the Respondents' legal and policy arguments are unpersuasive. Third, United's brief contains a number of inaccurate,

misleading or speculative statements. Many of the more complex questions raised by United and ALPA involve issues that should be resolved by this Court on the merits.

II. ALPA And United Misinterpret The Seventh Circuit's Opinion From Which URPBPA Appeals.

Contrary to United's argument, the Seventh Circuit did not base the ruling in issue on the doctrine of "equitable mootness" and it did not state that no effective relief could be granted to the retired pilots. Rather, the Seventh Circuit held that unsecured creditors who have nothing more than "some potential blocking power" over a proposed bankruptcy transaction should not be given the right to needlessly complicate major corporate bankruptcies by exploiting that "blocking power." *United Retired Pilots Benefit Protection Association v. United Airlines, Inc.*, 443 F.3d 565, 572 (7th Cir. 2006). In other words, creditors should not be able to throw a monkey wrench into transactions that do not directly concern them in order to obtain financial gain. Judge Posner stated that no "feasible remedy" could be provided to the retired pilots because he did not believe the retired pilots have their own protectable contract rights. *Id.* at 572-73. According to the court, an unsecured creditor, who has nothing more than the right to participate generally in a Chapter 11 proceeding rather than a specific interest in a transaction that has been approved under 11 U.S.C. § 363(b)(1), should not be permitted to upset that transaction on appeal because there is no "objective basis" to value the unsecured creditor's "blocking power" in a "hypothetical negotiation" after the transaction has already been approved. *Id.*

However, even though Judge Posner mischaracterized the nature of the retired pilots' rights, which are vested contract rights that are independent of the active pilots' contractual rights, he rejected United's motion to dismiss URPBPA's appeal as "moot." The court stated:

> Recently United emerged from bankruptcy and it argues that this renders the appeal moot. That is incorrect. All the retired pilots are seeking in the first place is a hearing before the bankruptcy

> judge, and we shall see that the judge could at that hearing deny any relief that would jeopardize United's newly recovered solvency.

Id. at 567. The Seventh Circuit understood that, with proper instructions on remand, the retired pilots could have been granted relief under 11 U.S.C. § 1113. The Seventh Circuit affirmed the decisions of the courts below, though, because it did not believe the retired pilots had enforceable contract rights (this part of the opinion is erroneous – even United and ALPA do not dispute the fact that the retired pilots' contractual rights to receive pension benefits do, in fact, vest upon retirement).

The Seventh Circuit misinterpreted URPBPA's position when, on page 570 of its opinion, the court assumed that URPBPA wanted to participate in negotiations regarding modifications to the collective bargaining agreement between ALPA and United that related to the rights of active pilots, and on page 571, where the court stated that ALPA and United were only required to seek court approval of their contractual modifications because "contracts made by the debtors that are not in the ordinary course may have an impact on the other creditors in the bankruptcy proceeding." URPBPA acknowledges that it has no interest in the modified terms of the collective bargaining agreement between ALPA and United except to the extent those modifications relate to the contractually vested pension rights of the retired pilots. URPPBA would not have objected to the modification of ALPA's collective bargaining agreement if the modifications concerned nothing more than the rights and interests of the active pilots. But Letter Agreement 05-01 and the orders entered by the bankruptcy court purport to terminate the retired pilots' vested contract rights while promising active pilots hundreds of millions of dollars in future benefits. The Seventh Circuit's analysis fails to acknowledge and account for the retired pilots' contractually vested pension rights.

If the Seventh Circuit had acknowledged the true nature of the retired pilots' rights, it would have done exactly what the Second Circuit did in *Century Brass*. After holding that the bankruptcy court failed to protect the retirees' vested retirement benefits under 11 U.S.C.

§ 1113, the Second Circuit remanded the case "with instructions to the bankruptcy court to appoint a representative for the retired employees of the debtor, and for such further proceedings under § 1113 as appropriate." *Century Brass*, 795 F.2d at 275. Likewise, the Seventh Circuit opinion demonstrates that, if the court had believed United's retired pilots had a direct, protectable interest in the subject of the negotiations between United and ALPA, the court would have ordered the bankruptcy court to hold a hearing but would have instructed the bankruptcy court to "deny any relief that would jeopardize United's newly recovered solvency." *United Retired Pilots*, 443 F.3d at 567.

Further, according to United, before URPBPA seeks substantive relief from this Court, it will first need to demonstrate that its appeal is not "equitably moot." But United's argument is inconsistent with and ignores the protections provided in 11 U.S.C. § 1113. Section 1113 itself protects a reorganizing debtor by permitting a debtor to make "those necessary modifications in the employee benefits that are necessary to permit the reorganization of the debtor . . . " 11 U.S.C. § 1113(b)(1)(A) and (c)(1). As a result, if this Court holds that the retired pilots are entitled to the procedural and substantive protections of § 1113, the bankruptcy court will have the necessary tools to protect the retired pilots' interests while also protecting what the Seventh Circuit refers to as "United's newly recovered solvency."[1] Furthermore, because United itself has stated that its plan of reorganization is robust enough to withstand United losing every appeal that was

[1] The other two "hurdles" United attempts to place in URPBPA's way do not provide bases for the denial of URPBPA's petition. If this appeal is briefed on the merits, URPBPA will demonstrate that United's attempt to create what it describes as a "doctrinal spaghetti bowl" in its discussion of 11 U.S.C. § 363(b)(1) and 11 U.S.C. § 1113 is misplaced. While the bankruptcy court approved United's agreement with ALPA under § 363(b)(1), it should not have approved any agreement between United and ALPA, under any section of the Bankruptcy Code, without first giving the retired pilots the right to protect their vested contract rights under § 1113. URPBPA will also demonstrate that the wholly separate appeal involving Independent Fiduciary Services did not control the Seventh Circuit's decision regarding this dispute and would not control this Court's review of URPBPA's appeal on the merits.

pending on the date United emerged from bankruptcy, even United has admitted that its newly reorganized company can afford to provide effective relief to the retired pilots.

While the parties disagree on a number of other issues relating to Judge Posner's opinion that will be addressed if this Court grants URPBPA's petition, one glaring inaccuracy in the Seventh Circuit's opinion (which is highlighted in United's brief) should be noted. When the court stated that the retired pilots were "bound to receive less" than the active pilots in any negotiations that would have taken place with United because the retired pilots "lost less" when their pension rights were bargained away, this statement is false. *Id.* at 569. The fact is, because United's retired pilots earned two-thirds of the benefits in the Pilot Plan, they are bound to lose more, and their loss vis-à-vis the active pilots is compounded by the fact that the active pilots received generous replacement benefits from Letter Agreement 05-01 while, as the Seventh Circuit also observed, the retired pilots "received nothing – and with no opportunity to negotiate for something." *Id.* at 569-70.

III. The Points Of Law And Social Policies Advanced By United And ALPA Are Unpersuasive.

United and ALPA make a number of legal and social policy arguments in an attempt to persuade this Court that URPBPA's certiorari petition lacks merit. These arguments are not persuasive.

For instance, United and ALPA argue that, because the Seventh Circuit did not address the issues outlined by URPBPA, and because, they assert, the Seventh Circuit issued a narrow holding, this controversy is not of the type this Court normally seeks to resolve. In addition, they argue that, because *Century Brass* and *Unimet* both involved the rejection of a collective bargaining agreement after a § 1113 hearing, rather than an agreement reached by a union and an employer before a § 1113 hearing, there is no circuit split for this court to resolve. But these attempts to distinguish the facts and limit the scope of Judge Posner's opinion fail. The bankruptcy court and the Seventh Circuit both

analyzed the retired pilots' arguments and the Seventh Circuit discussed the case law upon which URPBPA relies. The Seventh Circuit's opinion and its treatment of the retired pilots' contractually vested rights conflicts with the treatment such rights received under *Century Brass*, *Unimet* and *Pittsburgh Plate Glass*. The central question URPBPA seeks to resolve has been squarely presented: may an employer and a union negotiate an agreement during Chapter 11 proceedings that takes vested contract rights away from retired employees? Furthermore, as URPBPA demonstrated in its opening brief, other cases pending in the courts below are addressing questions related to the interpretation of 11 U.S.C. § 1113 and the very same issues that are presented in this appeal.

The parties argue that, because the termination of a defined benefit pension plan requires a hearing under either 29 U.S.C. § 1341(c) (a "distress termination proceeding") or 29 U.S.C. § 1342(c) (an "involuntary termination proceeding" initiated by the Pension Benefit Guaranty Corporation ("PBGC")), the retired pilots should not be overly concerned about the purported termination of their contract rights. This argument also fails. United admits that it needed to terminate the contractual obligations that required it to continue maintaining the Pilot Plan before it could seek a "distress termination" under ERISA. Section 1113 provides unique protections for collectively bargained contract rights that are not available under ERISA. In addition, even though the PBGC initiated an involuntary termination action and obtained a termination order, that order could be overturned on appeal and, more importantly, the PBGC action only sought the termination of the tax-qualified portion of the Pilot Plan. United's retired pilots need to preserve the vested contractual rights that protect their non-qualified pension benefits because, as the PBGC has made clear, the PBGC does not have any interest in the retired pilots' non-tax-qualified pension benefits.

The Seventh Circuit rejected United and ALPA's argument that the enactment of 11 U.S.C. § 1114 somehow limited the protections to which retired employees are entitled under 11 U.S.C. § 1113. The Seventh Circuit was right when it stated that "there is no indication that Congress was specifying or disallowing procedures to be

used in section 1113 proceedings" when it enacted § 1114. *United Retired Pilots*, 443 F.3d at 569.

ALPA argues that, under federal labor law, only the employees' exclusive bargaining agent can negotiate a new collective bargaining agreement for employees. This argument completely misses the point. As URPBPA has emphasized throughout its appeals, URPBPA does not claim to have any right to bargain over the rights and benefits of active employees. Likewise, ALPA has no right to bargain away the vested contract rights of the retired pilots.

In the end of their briefs, United and ALPA attempt to convince this Court that cutting United's retired pilots out of negotiations regarding their pension benefits was not unfair and that many different parties suffered economic hardships during United's bankruptcy proceedings. But, unlike United's other creditors, including the retirees represented by all of United's other unions, the retired pilots never even had the opportunity to protect their vested contract rights before they were taken away. It is clear that the retired pilots, who were not given access to the generous replacement benefits ALPA received from Letter Agreement 05-01, were not treated equitably and not afforded the Bankruptcy Code protections to which they were entitled.

IV. United's Brief Contains Inaccurate, Misleading And Speculative Statements.

United's brief contains a number of inaccurate, misleading and speculative statements. For instance:

(1) United wrongly states that URPBPA stopped pursuing its appeal of the bankruptcy court's December 14, 2004 order denying URPBPA's motion for the appointment of a § 1113 authorized representative. After URPBPA filed its appeal of the bankruptcy court's January 31, 2005 order approving Letter Agreement 05-01 between ALPA and United, the district court dismissed URPBPA's appeal of the December 14, 2005 order, holding that two appeals involving the same proceeding were unnecessary. Because the issues from both appeals were consolidated into a single appellate proceeding, there was simply no reason for URPPBA to continue pursuing its first-filed appeal.

(2) United states that URPBPA did not seek to obtain a stay of the order approving Letter Agreement 05-01, the agreement at issue in this appeal. United is wrong. On January 20, 2004, URPBPA filed URPBPA And Certain Individual Retired Pilots' Objection To Debtors' Emergency Motion To Approve ALPA Letter Agreement And Emergency Motion For Stay Pending Resolution Of Appeal. The bankruptcy court denied URPBPA's stay motion the next day. This is not the only stay motion filed by URPBPA during United's bankruptcy proceedings. URPBPA's counsel is not aware of any stay motions having been granted during United's bankruptcy proceedings and, furthermore, it is well-settled that a party is not required to seek or obtain a stay in order to appeal a bankruptcy court order.

(3) United faults URPBPA for not having prosecuted its appeals more quickly without telling this court that United routinely files motions to dismiss all of URPBPA's appeals, thereby prolonging the amount of time necessary to resolve these appeals. For instance, United filed motions to dismiss URPBPA's appeals of the bankruptcy court's December 14, 2004 and January 31, 2005 orders, arguing that URPBPA's appeals were interlocutory and, thus, filed too soon. Then, when the consolidated appeal of these orders went before the Seventh Circuit, United argued that this appeal was "equitably moot" because it came too late. United's appellate tactics have caused delays in the resolution of URPBPA's appeals. United's overall strategy seems to be preventing URPBPA from having its appeals, including this one, which United argues once again is "equitably moot," decided on the merits.

(4) United has asserted that the retired pilots will receive a bankruptcy claim for the termination of all of their pension benefits. This is not true. On July 27, 2005, United filed an objection to the contingent proof of claims the retired pilots filed to recover claims in the event their tax-qualified pension benefits were terminated during United's Chapter 11 proceedings. On September 2, 2005, the bankruptcy court granted United's motion. As a result of the bankruptcy court's order, United's retired pilots did

not receive a claim distribution related to their loss of tax-qualified pension benefits, although certain retired pilots did receive modest claim distributions related to the cancellation of their non-tax-qualified pension benefits.

(5) United also makes a number of speculative, unproven assertions related to its alleged need to terminate its defined benefit pension plans, including the Pilot Plan. United has never proven that it cannot afford to continue paying for the Pilot Plan. In fact, before the PBGC sought the "involuntary termination" of the Pilot Plan pursuant to 29 U.S.C. § 1342(c), the PBGC's financial expert filed a report (the Kramer Report) which demonstrated that, even under United's own overly conservative financial projections, the Pilot Plan could have been saved. There is simply no proof that United cannot afford to continue the Pilot Plan.

While there are other statements that could be clarified, URPBPA will address those statements (as necessary) if this Court grants URPBPA's petition.

V. Conclusion.

URPBPA's Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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